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Attorney for Defendant
 and Counterclaimant
 STEPHANIE DODSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:	)Case No. 05-32929
)
ALEXANDER N. POPOV,	)Chapter 7
)
Debtor.)
_____)
	)A.P. No. C-08-225-SC
YUGEN KAISAH, Y.K.F.)
	)MOTION OF STEPHANIE DODSON FOR
	)(1) ABSTENTION, OR, ALTERNATIVE-
STEPHANIE DODSON,	)LY, (2) FOR A STAY, AND (3) FOR
	)SECURITY FOR COSTS
Defendant.)
_____	)Date: April 25, 2008
	)Time: 10:00 a.m.
STEPHANIE DODSON,	)Court: Judge Conti
Counterclaimant,)
vs.)
)
YUGEN KAISAH, Y.K.F.)
)
Claimant.)
_____)

COMES NOW defendant and counterclaimant, STEPHANIE DODSON
 ("Dodson"), and moves the Court (1) to abstain from hearing this
 bankruptcy adversary proceeding for which Bankruptcy Judge Thomas
 Carlson has withdrawn the bankruptcy reference, or,

1 alternatively, (2) for an order staying the proceeding because of
2 plaintiff, YUGEN KAISAH, Y.K.F.("YKF"), has failed to qualify to
3 do business in the State of California, although it is doing
4 business in the State, and (3) to compel YKF to furnish security
5 for costs (the "Motion").

6 INTRODUCTION

7
8 This Court is sitting as the bankruptcy court in presiding
9 over this adversary proceeding originally brought by YKF in the
10 bankruptcy court in San Francisco. On January 7, 2008, Judge
11 Carlson certified that the reference of the adversary proceeding
12 to the bankruptcy court was withdrawn in the face of Dodson's
13 filing of her counterclaim against YKF (the "Counterclaim") on
14 "which she properly demanded trial by jury," Certification for
15 Withdrawal of Reference filed January 7, 2008, and in the absence
16 of Dodson's consent to a jury trial in the bankruptcy court.

17 CLAIMS

18 YKF filed its complaint herein (the "Complaint") for an
19 alleged fraudulent transfer to Dodson by debtor, Alexander Popov
20 ("Debtor"), of Debtor's interest in certain shares of corporate
21 stock of Smart Alec's Intelligent Foods, Inc., a California
22 corporation ("Smart Alec's"). As she testified at the trial in
23 the bankruptcy court in an objection to discharge proceeding,
24 *Triano v. Popov*, A.P. No. 05-3485 (the "Triano AP"), Dodson
25 purchased, under a share purchase agreement dated April 18, 2004
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1 (the "Share Purchase Agreement"), for a price of \$12,500,
2 Debtor's residual interest in 3,744,000 Smart Alec's shares (the
3 "Shares"), which were, as of April 2004, pledged to YKF as
4 security for hundreds of thousands of dollars of indebtedness.

5 The Share Purchase Agreement is attached as Exhibit 3 to the
6 Complaint. YKF filed in the bankruptcy court a motion to dismiss
7 the Counterclaim, and attached as Exhibit 1 to that motion a copy
8 of a confidential settlement agreement and release among YKF,
9 Smart Alec's, Debtor and Dodson dated February 6, 2004 (the
10 "Settlement Agreement") settling an Alameda County Superior Court
11 suit brought by YKF against Smart Alec's, Dodson and Debtor, No
12 2002-061123 (the "YKF State Court Action"); at page 2, paragraph
13 2.b, of that agreement, Debtor agreed to pledge the Shares to
14 YKF. Thus, at the time of the transfer that is the subject of its
15 Complaint, which YKF alleges was intended to hinder, delay or
16 defraud creditors, YKF had physical possession of the Shares.

17
18 Martin F. Triano ("Triano"), the plaintiff in the Triano AP,
19 has sued Dodson (and Smart Alec's) in a new Alameda County
20 Superior Court, in *Triano v. Dodson, et al.*, No. RG-07-322877
21 (the "Alameda SCT Action"), alleging that he, Triano, has a first
22 lien on the Shares. Triano also seeks to intervene in this
23 proceeding, contending that because ownership of the Shares is
24 being litigated herein, he has an interest, as a lien claimaint,
25 in protecting himself.
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1 In the Counterclaim, Dodson alleges that, in delaying
2 Dodson's final payoff of the balance of indebtedness to YKF (the
3 same \$775,000 indebtedness, secured by the Shares and assets of
4 Smart Alec's, that is the subject of the Settlement Agreement),
5 YKF extracted from Dodson the sum of approximately \$90,000 in
6 increased fees and charges by delaying, in bad faith, the payoff.
7

8 YKF, after its final extraction from Dodson under the
9 Settlement Agreement, came to the bankruptcy trustee in the
10 underlying Chapter 7 case herein and acquired, for \$30,000, the
11 bankruptcy estate's avoidance rights.

12 **ARGUMENT**

13 This case poses a curiosity: an adversary proceeding brought
14 in the bankruptcy court by a plaintiff alleging a fraudulent
15 conveyance, in which the plaintiff is neither a bankruptcy
16 trustee nor bankruptcy debtor nor is it a creditor of the
17 bankruptcy estate. Moreover, the defendant is neither a debtor
18 nor a creditor of the bankruptcy estate. In fact, only Triano has
19 a stake in the bankruptcy case, because he is a creditor, albeit
20 a disputed one.
21

22 **A. This Court should abstain from hearing this proceeding.**

23 A bankruptcy court may abstain from hearing an adversary
24 proceeding "in the interest of justice, or in the interest of
25 comity with state courts or respect for state law." 28 U.S.C.
26 Sec. 1334(c)(1). Among the factors considered by courts in
27 determining whether permissive abstention is appropriate are: the
28

1 extent to which state issues predominate over bankruptcy issues,
2 the presence of a related proceeding commenced in the state
3 court, the jurisdictional basis, if any, other than 28 U.S.C.
4 Sec. 1334, the degree of relatedness or remoteness of the
5 adversary proceeding to the main bankruptcy case, the likelihood
6 that commencement of the proceeding in the bankruptcy court
7 involves forum shopping, the right to a jury trial, and the
8 presence of nondebtor parties. March, Ahart & Tchaikovsky, CAL.
9 PRAC. GUIDE: BANKRUPTCY (The Rutter Group 2007), 1:740, p. 1-61-
10 62, (citing *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th
11 Cir. 1990); *In re Eastport Assocs.*, 935 F.2d 1071, 1075-1076 (9th
12 Cir. 1991); *In re Lazar*, 200 B.R. 358, 372 (Bkrtcy C.D. Calif.
13 1996)).

14
15 In this case, there is neither a debtor nor trustee, and the
16 only creditor involved, Triano, is not named in the Complaint.
17 The Complaint (and Dodson's Counterclaim) do not impact the
18 bankruptcy estate; whether YKF or Dodson wins or loses, there
19 will be no more or less money in the bankruptcy estate for
20 payments to Alex Popov's creditors. YKF alleges both the
21 Bankruptcy Code and the California Code of Civil Procedure
22 provisions dealing with alleged fraudulent conveyances, so this
23 is not a case in which, on the plaintiff's own terms, only
24 federally originated claims are made.

25
26 YKF could have brought this proceeding against Dodson in the
27 Alameda County Superior Court; it knows the way, having sued
28

1 Dodson and Debtor there previously in the YKF State Court Action.
2 The fact that, with the purchase of the bankruptcy trustee's
3 rights to assert avoidance actions, YKF sued in the bankruptcy
4 court versus returning to the Alameda County Superior Court
5 suggests forum shopping on its part. And there is Triano's
6 pending Alameda SCT Action against Dodson and Smart Alec's;
7 Dodson submits that if the Court were to abstain herein, YKF
8 would sue again in the state court. In other words, YKF will not
9 be without a forum to adjudicate its claims against Dodson (and
10 her claims against YKF).
11

12 Someone who buys an asset from a bankruptcy estate, in this
13 instance a cause of action for an alleged fraudulent conveyance,
14 should not have use of the bankruptcy courts to try that action
15 where there are other courts of competent jurisdiction. For that
16 reason, the Court should abstain.

17 **B. This proceeding should be stayed because YKF has not**
18 **qualified to do business in California.**

19 If the Court does not abstain, YKF asks that it stay the
20 action because of YKF's incapacity maintain this proceeding
21 because it is not qualified to do business in California, and,
22 potentially, it may not have capacity to sue under Japanese law.
23

24 Under California law, a foreign corporation not qualified to
25 do business in California may not maintain an action in
26 California courts, Corporations Code Section 2203(c). Defendant
27 submits that rule should also preclude Plaintiff's maintaining
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1 this proceeding. YKF, of course, describes itself as a foreign
2 corporation with no California presence. The following action's
3 by YKF, disclosed upon the record of this proceeding, constitute
4 a California presence

5 (1) investing \$720,000 in California in shares of Smart
6 Alec's, a California corporation that operates a single
7 restaurant in on Telegraph Avenue in Berkeley, California; then

8 (2) suing in the Alameda County Superior Court over that
9 investment through the same attorneys who represent it in this
10 proceeding; then

11 (3) settling that suit in February 2004 by the Settlement
12 Agreement, which was (a) entered into in California, secured (b)
13 by a pledge in California of Smart Alec's shares and (c) by a
14 UCC-1 filing in Sacramento, California for Smart Alec's assets
15 and specifying California as the source of law for any disputes;
16 then

17 (4) entering into a closing agreement with Dodson in March
18 2007 in California, which is the subject of her Counterclaim,
19 specifying California law and calling for payment by Dodson to
20 YKF to the trust account of YKF's attorneys in San Francisco (who
21 represent YKF herein); then

22 (5) purchasing the avoidance rights sued upon herein from a
23 bankruptcy trustee in San Francisco, under an agreement entered
24 into in San Francisco and approved by the bankruptcy court,
25 sitting in San Francisco; and then
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1 (6) suing on the avoidance rights in a federal court in San
2 Francisco.

3 **C. The Court should compel YKF to furnish security for**
4 **costs.**

5 Alternatively, Dodson also seeks an order that YKF, which
6 alleges that it is a Japanese corporation, furnish security for
7 costs. Specifically, YKF should be required to furnish \$25,000 in
8 security, or such other sum as the Court deems reasonable.

9
10 This Court has the power to require Plaintiff to post
11 security under the federal courts' power to tax costs. *Anderson*
12 *v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495, 496 (7th Cir.
13 1993). Federal courts follow the forum state's practice with
14 regard to security for costs. *Simulnet East Assocs. v. Ramada*
15 *Hotel Operating Co.*, 37 F.3d 573, 574 (9th Cir. 1994).

16 California law provides in CCP Section 1030 that a defendant
17 may file a motion for an order requiring a nonresident or foreign
18 corporation plaintiff to furnish an undertaking for costs and
19 attorney's fees.

20 Without knowing what discovery will have to be taken and how
21 cooperative YKF will be in bringing witnesses from Japan or North
22 Carolina (where YKF's agent, with whom Dodson was dealing before
23 she paid off the debts to Defendant under the Settlement
24 Agreement, was or is located), Dodson could face significant
25 costs, beyond her attorney's fees, in defending this proceeding.
26 California CCP Sec. 1033(a)(3) includes deposition transcripts
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1 and travel expenses to attend depositions as allowable items of
2 costs. Accordingly, Dodson asks that YKF be made to furnish a
3 \$25,000 undertaking.

4 Respectfully submitted,

5 Dated: February 29, 2008

THE LAW OFFICE OF JOEL K. BELWAY
Professional Corporation

7 /s/ Joel K. Belway

JOEL K. BELWAY

8 Attorney for Stephanie Dodson

DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. On February 29, 2008, I served the attached **Motion of Stephanie Dodson for (1) Abstention, or Alternatively, (2) for a Stay, and (3) for Security for Costs** on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.
Gregory E. Schopf, Esq.
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25 Jessie Street
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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 29, 2007, at San Francisco, California.

\s\ Joel K. Belway